RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

(10) (10)

Nos. 04-277 & 04-281

2005

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

- and -

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE VERIZON TELEPHONE COMPANIES, GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS, and VERIZON INTERNET SERVICES INC. IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the statutory definitions contained in the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*, prohibit the Federal Communications Commission from classifying broadband Internet access service as only an "information service," subject to minimal regulatory constraints, without a separately regulated "telecommunications service" component.

PARTIES TO THE PROCEEDING

Pursuant to Rule 24.2 of the Rules of this Court, Respondents adopt the list of parties to the proceeding in the court of appeals that is contained in the Brief of the Federal Communications Commission and the United States, with the exception of the "Verizon" respondents, which are identified below pursuant to Rule 29.6.

RULE 29.6 DISCLOSURE

Respondents the Verizon telephone companies, listed below, are wholly owned subsidiaries of Verizon Communications Inc.:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Respondent GTE.Net LLC d/b/a Verizon Internet Solutions is a wholly owned subsidiary of Verizon Technology Corp., which itself is an indirect wholly owned subsidiary of Verizon Communications Inc.

Respondent Verizon Internet Services Inc. is a wholly owned subsidiary of Bell Atlantic Entertainment and Information Services Group, Inc., which itself is an indirect wholly owned subsidiary of Verizon Communications Inc.

Verizon Communications Inc. is a publicly held corporation. Verizon Communications Inc. does not have a parent company, and no publicly held company has a ten-percent or greater interest in it.

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OPINION AND ORDER BELOW

Pursuant to Rule 24.2 of the Rules of this Court, Respondents the Verizon telephone companies, GTE.Net LLC d/b/a Verizon Internet Solutions, and Verizon Internet Services Inc. ("Verizon") adopt the statement regarding the opinion and order below that is contained in the Brief of the Federal Communications Commission ("FCC" or "Commission") and the United States of America.

JURISDICTION

Pursuant to Rule 24.2 of the Rules of this Court, Verizon adopts the statement of jurisdiction that is contained in the Brief of the FCC and the United States of America.

STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Communications Act of 1934, as amended ("Communications Act" or "Act"): 47 U.S.C. §§ 153(20), 153(43), 153(46), 160(a), 230, 254, and 522. This case also involves Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706 ("1996 Act"), 110 Stat. 153, *reprinted in* 47 U.S.C. § 157 note.

Sections 153(20), 153(43), 153(46), 160(a), 230, 254, and 522 of Title 47 of the U.S. Code are reprinted at FCC Pet. 208a-213a. Section 706 of the 1996 Act is reprinted at Resp. 18a-20a.[1]

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1. Citations to "FCC Pet." are to the Petition for a Writ of Certiorari filed by the FCC and the United States. Citations to "NCTA Pet." are to the Petition for a Writ of Certiorari filed by the National Cable & Telecommunications Association, *et al.* ("NCTA"). Citations

(Cont'd)

STATEMENT OF THE CASE

I. Legal and Factual Background

A. The National Policy of Promoting Broadband Investment and Deployment

This case involves the proper statutory classification and regulatory treatment of broadband (or "high-speed") Internet access services. Broadband allows the retrieval of information from the Internet in "real-time" and the reception of high-quality graphics, pictures, audio, and video through the Internet, at speeds up to twenty times faster than traditional narrowband (or "dial-up") connections. *See* FCC Pet. 52a-54a.

Numerous competitors using different transmission technologies currently offer broadband Internet access service, and the FCC repeatedly has found that the broadband market is developing on a competitive basis and that the preconditions for monopoly are absent.[2] Broadband service offered over cable networks is referred to as "cable modem service." FCC Pet.

(Cont'd)
to "Resp." are to Verizon's response in support of certiorari. For the convenience of the Court, Verizon's response in support of certiorari included a supplemental appendix containing the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), in addition to Section 706 of the 1996 Act, *see* Sup. Ct. R. 14.1(*i*)(ii), 14.1(f).

2. *E.g.*, *Rulemaking to Amend Parts 1, 2, 21, & 25*, 15 F.C.C.R. 11,857, 11,865 (2000); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable & Timely Fashion*, 14 F.C.C.R. 2398, 2423-24 (1999) ("*First Section 706 Report*").

49a-50a. The first generation of broadband services offered by telephone (or "wireline") companies, including Verizon, are called digital subscriber line ("DSL"). Verizon has recently started to deploy fiber-to-the-premises ("FTTP") – the next generation of telephone company-provided broadband services. Verizon's FTTP network will allow data speeds ten times faster than cable modem or DSL, will include a separate path for video, and will be more reliable than today's copper-based technologies. In addition to cable and telephone companies, satellite operators, fixed and mobile wireless companies, and electric utilities offer broadband services. *See, e.g., Availability of Advanced Telecomms. Capability in the United States*, FCC 04-208, 2004 FCC LEXIS 5157, at *2, *12, *13-*44 (Sept. 9, 2004) ("*Fourth Section 706 Report*").

The economic and social benefits of the widespread deployment of broadband capabilities are well documented. Broadband allows businesses to increase efficiency and productivity, resulting in substantial economic and job growth. *See* FCC Pet. 4. Broadband also fuels the development of new and innovative services, including Internet-delivered video, audio, and voice communications. For example, broadband connections have made possible new voice-over-Internet-protocol ("VOIP") services, which compete with traditional telephone services. *Fourth Section 706 Report*, 2004 FCC LEXIS 5157, at *44-*45. And next-generation networks, including the FTTP network that Verizon is currently deploying, will deliver not only voice and data services, but also video programming, providing consumers with a competitive alternative to cable and satellite systems.

To make the promise of broadband widely available, broadband providers, including both cable operators and

telephone companies, have spent billions of dollars upgrading their existing infrastructure and building new facilities. The United States, however, still lags behind other nations in broadband penetration, currently ranking thirteenth. *See* Anne Veigle, *Supreme Court to Hear Brand X Cable Modem Case*, Communications Daily, Dec. 6, 2004, at 1. Because "the infrastructure of today may be insufficient to support the applications of tomorrow," significant additional capital investment is needed to ensure widespread deployment of this critical new technology. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3022 (2002) ("*Wireline Broadband NPRM*").

Congress has made clear that encouraging broadband investment and deployment is among the nation's central communications policy goals. In the 1996 Act, Congress sought to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services." S. CONF. REP. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. CONF. REP. No. 104-458, at 1 (1996) (Joint Explanatory Statement). Thus, by statute it is "the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). Congress further directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by, among other things, taking "measures that promote competition," and employing other "methods that remove barriers to infrastructure investment." 1996 Act, § 706(a)-(b). Consistent with these statutory commands, the FCC has found that "[t]he widespread

deployment of broadband infrastructure has become the central communications policy objective of the day." *Wireline Broadband NPRM*, 17 F.C.C.R. at 3020-21 (footnote omitted).[3]

B. The Communications Act's Distinct Service Definitions

Three statutory definitions are relevant to this case, each of which was added to the Communications Act by the 1996 Act: (1) "telecommunications," (2) "telecommunications service," and (3) "information service." *See* 47 U.S.C. §§ 153(43), 153(46), 153(20). The central question in this case is whether cable modem service offered to retail subscribers is appropriately classified as an "information service" that uses "telecommunications" to perform the transmission function as the FCC found, *see* FCC Pet. 88a-116a, or whether the statutory definitions in the Act require the FCC to find a separate "telecommunications service" offering inside every broadband Internet access service as the Ninth Circuit directed, *id.* at 21a-22a.

The initial statutory classification of any service under the Communications Act determines the regulatory regime that will apply. *See id.* at 189a (Chairman Michael K. Powell, stating that Congress "has defined . . . rights and obligations differently, depending on the nature of the service offered without regard to the means in which it is offered"); *cf. Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 355-56

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3. *See Amendment of Part 15 Regarding New Requirements & Measurement Guidelines for Access Broadband Over Power Line Sys.*, FCC 04-245, 2004 FCC LEXIS 6134, at *16-*17 (Oct. 28, 2004); *IP-Enabled Servs.*, 19 F.C.C.R. 4863, 4865 (2004) ("*VOIP NPRM*").

(2002) (Thomas, J., concurring in part and dissenting in part). The classification of a transmission service as a "telecommunications service" means that the service is, absent an express act of waiver or forbearance, subject to common carrier treatment and regulation under Title II of the Communications Act. This includes regulatory mandates such as price controls through tariffing, service regulation, access rules, and a requirement to provide service indiscriminately to all customers. FCC Pet. 6, 9a. By contrast, information services are largely unregulated and may be offered on an integrated basis to both retail and wholesale customers on market-based terms. *See id.* at 7, 9a; NCTA Pet. 4.

The broadest of the statutory terms at issue here is "telecommunications," which is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). This definition encompasses any "pure transmission" function, including those used in the delivery of other defined services under the Act. Well before the passage of the 1996 Act, both the FCC and the federal courts had recognized that many "pure transmission" functions should not be subject to common carrier regulation. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976) ("*NARUC I*") (upholding Commission decision to treat certain commercial mobile services as non-common carrier telecommunications); *see also infra* n.9.

The second statutory classification is a subset of the first. A "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to

the public, regardless of the facilities used." 47 U.S.C. § 153(46). Both the FCC and the federal courts have construed the definition of "telecommunications service" to be synonymous with the concept of "common carriage" as developed and applied prior to the enactment of the 1996 Act. *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999); *Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8521-22 (1997). The legislative history of the 1996 Act confirms that the definition of "telecommunications service" "recognize[s] the distinction between common carrier offerings . . . and private services." H.R. CONF. REP. NO. 104-458, at 115 (1996).

The *sine qua non* of a common carrier service is the undertaking to serve all customers indiscriminately, whereas a non-common carrier (or "private carrier") reserves the right to refuse service or to provide service on individualized and distinct terms and conditions. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*"); *NARUC I*, 525 F.2d at 642. A given service provider may be a common carrier with respect to some services but a private carrier with respect to others. *See S.W. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *NARUC II*, 533 F.2d at 608. The "common carriage" undertaking for a particular service may be voluntary or, in certain limited circumstances, it may be imposed by regulation. Historically, absent a voluntary undertaking to provide a service on a common carrier basis, such duties have been imposed only where substantial market power necessitates regulation. *See, e.g., Virgin Islands Tel.*, 198 F.3d at 925-27.

Finally, the Act defines an "information service" as the "offering of a capability for generating, acquiring, storing,

transforming, processing, retrieving, utilizing, or making available information." 47 U.S.C. § 153(20). Services falling within this definition must still be delivered to end-users through some form of transmission. The definition therefore recognizes that "information services" are made available "via telecommunications." *Id.* By using the broader term "telecommunications," rather than the narrower term "telecommunications service," the statute expressly recognizes that an entity offering "information services" is not necessarily *providing* a separate "telecommunications service" to its retail subscribers; rather it is *using* "telecommunications" as part of a larger service offering. *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000); *see Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,521 (1998). Accordingly, the transmission component of an information service may be either a common carrier or a non-common carrier offering.

This too is consistent with pre-1996 Act precedent, which asks whether a carrier possesses market power before compelling it to offer service on a common carrier basis. Since the late 1970's, the FCC's so-called "*Computer Rules*" have required certain telephone companies to separate out and provide indiscriminate access to the transmission component of their information service offerings and to "unbundle" the various elements of the transmission component on request. *See Amendment of Section 64.702 of the Comm'n's Rules and Regulations*, 77 F.C.C.2d 384, 474-75 (1980) ("*Computer II*") (subsequent history omitted). In adopting the *Computer Rules*, the Commission found that certain carriers had "bottleneck" control over transmission facilities under the conditions that prevailed in the narrowband market of the 1970's and 1980's. Based upon that finding, the FCC imposed the full panoply of common carrier obligations only upon a limited class of providers. FCC Pet. 89a-90a n.139. In contrast, the FCC found

that carriers that had no control over bottleneck local facilities, and therefore "d[id] not have . . . market power," could not act anticompetitively and therefore need not be subject to the *Computer Rules*. *Computer II*, 77 F.C.C.2d at 468-69.

C. The Commission's Treatment of Broadband Internet Access Services Prior to its Issuance of the Declaratory Ruling

During the early stages of the broadband market's development, the FCC declined to classify or to regulate cable modem service. *See Gulf Power*, 534 U.S. at 352-56 (Thomas, J., concurring in part and dissenting in part) (describing the FCC's "agnosticism" on the statutory classification question). Thus, cable operators were left free from any regulation, let alone restrictive common carrier rules, in their deployment and provision of broadband service.

On the other hand, during that same time period, the Commission simply assumed that any service offered by a telephone company was a "telecommunications service" and reflexively imposed the legacy common carrier obligations applicable to voice telephony on the transmission component of DSL service. *See Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,029-30 (1998) (subsequent history omitted); *GTE Tel. Operating Cos.*, 13 F.C.C.R. 22,466, 22,483 (1998). It did so mechanistically, in cursory proceedings, based only on the identity of the provider. Indeed, the extension of common carrier treatment to DSL was not supported by any analysis at all – let alone a careful examination of the relevant statutory definitions, market conditions, incentives to make capital investments and deploy facilities, and relative costs and benefits of common carrier regulation.

At least in part because of its substantial regulatory advantage, cable modem service grew to become the clear leader in the broadband market. For the last several years, cable has consistently maintained a broadband market share of fifty-eight to sixty-five percent. FCC, Indus. Analysis & Tech. Div., *High-Speed Servs. for Internet Access: Status as of Dec. 31, 2003*, at 6 (Table 1) (June 2004), *at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0604.pdf; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 F.C.C.R. 1606, 1643 (2004). Recent industry analysis indicates that cable is exhibiting its "best performance in nearly two years" and currently has a 62.3% share of the broadband market. Michael Harris, *Cable Turns the Table on DSL in Third Quarter, North American MSOs Recapture Broadband Market Momentum*, Cable Datacom News (Dec. 1, 2004), *at* http://www.cabledatacomnews.com/dec04/dec04-1.html.

While cable modem service is undoubtedly the market leader, the FCC has repeatedly found that competition in the broadband market is extensive and growing. *See, e.g., Fourth Section 706 Report*, 2004 FCC LEXIS 5157, at *2, *12, *13-*44; *Wireline Broadband NPRM*, 17 F.C.C.R. at 3022. The federal courts, too, have confirmed that "robust competition" exists in the "broadband market." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003); *see United States Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313 (2004). Although the current broadband market is vibrantly competitive, the Commission has reaffirmed the need to encourage additional investment in and deployment of broadband technologies through a uniform national broadband policy. *See, e.g., Wireline Broadband NPRM*, 17 F.C.C.R. at 3023.

In apparent recognition of the need to address both the anomalous regulatory asymmetry in its current regulatory treatment of competing broadband services and its statutory obligation to remove barriers to investment in broadband technologies, the FCC has commenced, but not completed, several proceedings to determine the appropriate regulatory framework that will apply to telephone company-provided broadband services. *See generally Wireline Broadband NPRM*, 17 F.C.C.R. 3019; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 F.C.C.R. 22,745 (2001) ("*ILEC Broadband NPRM*").[4] Through those proceedings and the further notice of proposed rulemaking appended to the order under review, the Commission has expressed its desire to develop a "rational framework for the regulation of competing services that are provided via different technologies and network architectures," FCC Pet. 48a, and to ensure that all "broadband services ... exist in a minimal regulatory environment" that will "promot[e] investment and innovation in a competitive market," *id.* at 47a; *see Wireline Broadband NPRM*, 17 F.C.C.R. at 3022-23. As discussed below, the Ninth Circuit's ruling presents an obstacle to the Commission's ability to achieve these goals – despite the fact that they are embodied in statutory commands contained in the 1996 Act itself.

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4. Both of these proceedings have been open for almost *three years* without decision at the time of submission of this brief.

II. The Proceedings Below

A. The FCC's Declaratory Ruling

In 2000, the FCC took the first step toward "develop[ing] a national legal and policy framework" for broadband services by releasing a Notice of Inquiry. *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 15 F.C.C.R. 19,287, 19,288 (2000) ("*Notice of Inquiry*"). Specifically, the Commission requested comments regarding, among other things, the interrelationship of the statutory classification of cable modem service and other broadband technologies, including DSL. *Id.* at 19,293.

After reviewing a comprehensive record containing hundreds of submissions from interested parties, and following a detailed examination of the Communications Act and relevant precedent, the FCC issued the *Declaratory Ruling* at issue in this case. *See* FCC Pet. 40a-181a. The *Declaratory Ruling* marked the first time that the Commission conducted a thorough analysis of the nature of broadband Internet access, the prevailing market conditions, and the regulatory framework that would best advance the twin goals of encouraging capital investment and intermodal competition. *See id.*; *see also Gulf Power*, 534 U.S. at 352-56 (Thomas, J., concurring in part and dissenting in part). The Commission made three critical findings with respect to the proper statutory classification and regulatory treatment of cable modem service.

First, the FCC found that, in light of its consistent conclusion that the broadband market constitutes a separate and vibrantly competitive product market, there is no basis for compelling cable operators to carve out the transmission component that underlies cable modem service and offer it on a common carrier basis. FCC Pet. 98a-102a. Thus, the

Commission classified the combined Internet access service offering of cable operators as an "information service," *id.* at 88a-98a, and the underlying transmission component of that service as a non-common carrier form of private "telecommunications" under the Act, *id.* at 100a-102a.

Second, the FCC waived on its own motion any application of the *Computer Rules* to cable modem service. Application of those rules would have required cable modem providers to separate the transmission component of cable modem service from its content component and offer the former on a common carrier basis to any requesting party. *Id.* at 102a-104a. The Commission determined that a waiver was appropriate because applying the *Computer Rules* would "disserve the goal of Section 706 [of the 1996 Act] that 'we encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'" *Id.* at 104a (citation omitted).

Third, the FCC found that where cable operators might be offering broadband transmission service separately to Internet service providers, there was no reason to compel the offering of such service on a common carrier basis. *See id.* at 109a-114a. Thus, the Commission stated that it would allow cable operators to continue to provide transmission service on a non-common carrier basis, *i.e.*, as "private carriage" (that is, as a form of "telecommunications" but *not* "telecommunications service"). *See id.* at 112a-114a.[5]

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5. The Commission also tentatively concluded that, even if common carrier requirements might be deemed to apply to cable modem service, the FCC likely would forbear from applying those

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B. The Ninth Circuit's *Per Curiam* Opinion

Seven different petitions for review of the FCC's *Declaratory Ruling* were filed in various courts of appeal and consolidated pursuant to lottery in the Ninth Circuit. *Id.* at 10a. Verizon's position was unique among the petitioners.

Verizon, which offers DSL in direct competition with cable modem service, argued that the Commission correctly concluded that cable modem service is an "information service" and that nothing in the Communications Act requires the FCC to strip out any portion of cable modem service or impose common carrier regulations upon it. *See id.* at 10a-11a. At the same time, Verizon maintained that the FCC had a constitutional and statutory obligation to arrive at a rational and competitively neutral regulatory regime for *all broadband services*, regardless of the corporate identity of the provider or the technology employed. *See id.* This was particularly so given the FCC's reliance on competition from DSL in the *Declaratory Ruling* to relieve market-leading cable modem providers of a host of regulatory requirements that the FCC had applied to telephone company-provided broadband services. *See id.* Verizon asked the court of appeals to affirm the FCC's analysis of the proper statutory classification of cable modem service and its reading of the statutory definitions of the Act, but to remand to the agency to address the inconsistency between the reasoning contained in the *Declaratory Ruling* and the present statutory treatment of DSL.

(Cont'd)

regulations to cable companies "because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing." *Id.* at 153a.

Other petitioners argued that *all* broadband Internet access services must be treated as common carrier services. *See id.* at 10a. Relying on the statutory definition of "telecommunication services," these petitioners argued that the statutory definitions added by the 1996 Act require the Commission to initially classify the transmission component of both cable modem and DSL as a common carrier service. These petitioners relied heavily upon the FCC's present regulatory treatment of DSL, arguing in essence that Congress had codified that regime and extended it to all broadband Internet access services.

The Ninth Circuit, in a *per curiam* decision, vacated the FCC's determination that cable modem service is an "information service" that does not include a separately regulated "telecommunications service." *Id.* at 21a-22a. The panel did so not because it disagreed with the Commission's statutory analysis, but because it concluded that it was bound by a prior Ninth Circuit panel decision pre-dating any formal FCC decision on the subject. *Id.* at 12a-22a. In that case, *AT&T Corp. v. City of Portland*, a different panel of the Ninth Circuit had held that because cable modem service sold to end users is provided via a transmission component – "telecommunications" under the Communications Act – and because cable modem service is offered to the public, cable modem service *ipso facto* contains a separate "telecommunications service." *See* Resp. 11a-12a, 15a-17a. Thus, the *Portland* panel declared that cable modem service must, absent the grant of a waiver or a forbearance decision by the FCC, be subjected to the full panoply of common carrier obligations that apply to such services under Title II of the Communications Act. *See id.*

The *Brand X* panel's complete reliance on *Portland* was curious, given the circumstances of the latter decision. The *Portland* panel did not examine the statutory interrelationship

among "telecommunications," "telecommunications services," and "information services." Nor did it consider the proper market definition, the presence of intense competition in the broadband market, or the decades of Commission and judicial precedent making clear that common carrier duties cannot be imposed unless the public interest requires them due to lack of competition. In addition, the *Portland* panel relied heavily on the Commission's treatment of DSL in reaching its decision. *See id.* at 16a (noting that "the FCC regulates DSL service . . . as an advanced telecommunications service subject to common carrier obligations"). Finally, the *Portland* panel acknowledged that the FCC had yet to speak to the statutory classification issue and had open administrative proceedings in which it intended to do so. *See id.* at 8a, 17a.

Moreover, the *Portland* panel conceded that "courts are ill-suited to fix [the] flow" of the Internet, and that the "quicksilver technological environment" in which broadband services exist would render it an "idle exercise" for a court even to attempt to establish a national policy on this subject. *Id.* at 8a. It also expressed its intention "*not [to]* impinge on [the FCC's] authority over these matters." *Id.* at 17a (emphasis added). Notwithstanding these statements, the panel in *Brand X* did just that, by elevating the *Portland* ruling over a contrary intervening decision by the agency charged by Congress with interpretation and enforcement of the Communications Act. FCC Pet. at 12a-22a.[6]

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6. Although adopting the *Portland* panel's conclusion that the transmission component of cable modem service is a "telecommunications service," the *Brand X* panel expressly left intact the FCC's determination that transmission services could be offered on a "private carriage" basis to Internet service providers, and did (Cont'd)

The *Brand X* panel also extended the *Portland* panel's rote reliance on the Commission's prior treatment of DSL. Indeed, the concurring opinion of Judge Thomas in *Brand X* (the author of the *Portland* decision) makes clear that the FCC's treatment of DSL was integral to the *Brand X* decision. *See id.* at 31a-32a (Thomas, J., concurring) (explaining prior FCC treatment of "Internet access via DSL" and concluding that the FCC's approach to DSL "reflects a much more reasonable reading of the statute").

Because it held that *Portland* was dispositive, the *Brand X* panel completely ignored the Commission's findings regarding the competitive state of the broadband market and the lack of any public interest justification for common carrier regulation. Nor did the *Brand X* panel consider the fact that the FCC's early decisions applying common carrier treatment to the transmission component of DSL services contained no statutory analysis and were under reconsideration at the agency in light of the very factors that had compelled the FCC's conclusions regarding the proper classification of cable modem service. Because the *Brand X* panel vacated the FCC's ruling that cable modem service was *not* subject to common carrier treatment, it declined to address Verizon's arguments that the First Amendment, principles of competitive neutrality contained in the Communications Act, and principles of reasoned decisionmaking required the FCC to classify competing broadband services, such as DSL, in the same manner. *Id.* at 22a n.14.

(Cont'd)
not purport to disturb the Commission's decision to waive the application of the *Computer Rules* to cable modem service or the FCC's power to forbear from applying common carrier requirements in its ongoing rulemaking. *See id.* at 22a n.14; *see also id.* at 34a-35a (Thomas, J., concurring).

SUMMARY OF ARGUMENT

The Ninth Circuit's reasoning in *Portland*, and the perpetuation of that reasoning in *Brand X*, fundamentally misapplied the definitions contained in the Communications Act. The statutory definition of an "information service" states that the service is offered "via telecommunications," 47 U.S.C. § 153(20), making clear that the transmission component of an information service cannot be classified as a "telecommunications service" simply because the integrated package is offered to the public. Similarly, Section 706(c) of the 1996 Act speaks of "advanced telecommunications capability" and "broadband telecommunications capability" without reference to the distinct and narrower category of "telecommunications services." Principles of statutory construction and the legislative history confirm Congress's intent to maintain the distinction between common carriage and non-common carriage or "private" telecommunications that was well-established prior to enactment of the 1996 Act.

Common carrier status has always been a function of either a voluntary decision to make an indiscriminate offering to the public or the imposition of common carrier duties based on perceived market power over transmission facilities that are essential to reach end-users. Nothing in the statutory definition of "telecommunications service" adopted by the 1996 Act was meant to alter this well-established two-pronged test for imposing common carrier duties or to compel the Commission to extend common carrier regulation beyond its roots in mitigating the effects of so-called natural monopolies. Given the deregulatory purpose of the 1996 Act in general, and its focus on encouraging investment in and deployment of broadband technologies in particular, the idea that Congress used the statutory definition of

"telecommunications service" to codify common carrier treatment for the transmission component of every new information service cannot be sustained.

The Ninth Circuit's reliance on the prior regulatory treatment of DSL is fundamentally misplaced. The transmission component of DSL was labeled a "telecommunications service" in cursory proceedings without any analysis of the statutory terms, applicable agency or court precedent, or competitive conditions in the broadband market. As the *Declaratory Ruling* implicitly recognizes, common carrier treatment of *any* broadband provider cannot be justified under prevailing market conditions. Unlike the narrowband transmission world of the 1970's and 1980's, there is no dominant broadband provider today. To the contrary, the market is characterized by vigorous competition across various delivery platforms. By holding that the Communications Act requires the transmission component of cable modem service (as well as the offerings of newer entrants such as satellite, fixed wireless and electric utilities) to be initially classified as a "telecommunications service" subject to common carrier regulation, the Ninth Circuit injected significant uncertainty with respect to the proper classification of *all* broadband services. Its decision undermines investment incentives and discourages innovation in this burgeoning market in contravention of clearly expressed national policy and impedes the Commission's efforts to establish a coherent national regulatory regime for all broadband providers consistent with Congress's vision in the 1996 Act.

Present market conditions, FCC and judicial precedent interpreting the Communications Act, and this Court's own First Amendment jurisprudence render unlawful mandatory

common carrier treatment of cable modem, DSL, or any other broadband service. This Court should reverse the decision below and hold that the FCC has statutory authority to classify all forms of broadband Internet access as "information services" subject to minimal regulation. The Court should further direct that the Ninth Circuit remand this case directly to the FCC, with instructions to expeditiously arrive at a coherent statutory classification for all broadband services, in light of this Court's opinion, that is consistent with the Communications Act's statutory requirements of competitive and technological neutrality.

ARGUMENT

I. The Court Below Misapplied the Relevant Definitions in the Communications Act and Ignored Decades of FCC and Judicial Precedent.

The *Brand X* panel's conclusion (based on the earlier *Portland* decision) that the transmission component of cable modem service sold to end users must be classified as a "telecommunications service" cannot be reconciled with the statutory definitions at issue.[7] In *Portland*, the Ninth Circuit

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7. Whatever the validity of the *Brand X* panel's determination that it was bound by *Portland*, *see* FCC Pet. 11a-21a, this Court obviously is not so bound, and may review the FCC's decision under the familiar two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Indeed, in *Chevron* itself this Court reversed the decision of a court of appeals despite the fact that the court of appeals had followed its own precedent in setting aside the agency decision at issue. *Id.* at 841-45; *see also, e.g., Muhammed v. Close*, 540 U.S. 749, 124 S. Ct. 1303, 1306 (2004) (*per curiam*) (criticizing court of appeals for "following the mistaken view expressed in [c]ircuit precedent").

reasoned that "Internet access for most users consists of two separate services." Resp. 11a. In the Ninth Circuit's view, the transmission part of the service, which "link[s] the user and the ISP, is classic 'telecommunications'" under the Communications Act. *Id.* As far as this part of the *Portland* panel's decision goes, it is correct – the transmission service that underlies Internet access service *does* fit squarely within the statutory definition of "telecommunications." 47 U.S.C. § 153(43).

But the *Portland* panel went further, concluding that because Internet access service includes "telecommunications," a cable company "provid[ing]" Internet access service to the public offers "telecommunications services," and thus is a "telecommunications carrier" subject to common carrier regulation unless the FCC waives or forbears from such regulation. Resp. 11a; *see id.* at 12a ("to the extent that [a cable modem service provider] provides its subscribers Internet transmission over its cable broadband facilities, it is providing a telecommunications *service* as defined in the Communications Act" (emphasis added)).

1. In reaching its conclusion, the *Portland* panel completely overlooked the fact that the Communications Act recognizes *two* categories of transmission services: (1) a broader category of "telecommunications," 47 U.S.C. § 153(43), which may be offered on a non-common carrier (or "private carriage") *or* a common carrier basis, and (2) the subset of "telecommunications" – "telecommunications services" – which are offered *only* on common carrier terms, *see id.* §§ 153(46), 153(44). Information services, by definition, are made available "via telecommunications," *id.* § 153(20), but that does not automatically render any portion of them separate "telecommunications services" with all the regulatory obligations that such a classification triggers. Rather than

"chart[ing] a course by the law's words" as it professed to do, Resp. 8a, the Ninth Circuit in *Portland ignored* the language of the statute and conflated the narrower statutory definition of "telecommunications services" with the broader definition of "telecommunications" to reach a conclusion that cannot be squared with the plain language of the Communications Act, *see id.* at 11a-12a, 15a-17a.[8]

If the Ninth Circuit were correct that cable modem service includes a separate "telecommunications service" simply because it includes a transmission function that is ultimately offered "to the public," *see* Resp. 11a, then there would have been no reason for Congress to have included a separate definition of "telecommunications" in the Communications Act or to have specified that "information services" are made available "via telecommunications." *See, e.g., United States v. Bean*, 537 U.S. 71, 75 n.4 (2002) ("'The use of different words within related statutes generally implies that different meanings were intended.'" (quoting 2A NORMAN SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46.06, p. 194 (6th ed. 2000))). Most communications services include a "pure transmission" element, but that does not mean that this element is treated as a separate "telecommunications service" just because it is a part of a larger service package offered to the public. Thus, the Ninth Circuit's reading of the statutory definitions at issue

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8. Judge Thomas's concurring opinion in *Brand X* illuminates the *Portland* panel's error in statutory construction. He criticizes the FCC for placing a "great deal of weight on the distinction" between "telecommunications" and "telecommunications service." FCC Pet. 30a (Thomas, J., concurring). The *Portland* and *Brand X* rulings obliterate the statutory distinction, contrary to *both* traditional principles of statutory construction and the expert agency's own interpretation of the statute.

in this case is wrong under any standard, whether it be a traditional judicial statutory construction inquiry or the more specialized analysis of the two-part test under *Chevron*. *Cf. Gulf Power*, 534 U.S. at 337-39.

2. The Ninth Circuit's decision that cable modem service includes a separate "telecommunications service" just because it includes a "transmission" component also conflicts with a substantial body of judicial and FCC precedent, much of which pre-dates the passage of the 1996 Act. When Congress enacts a statute against the background of settled judicial and administrative interpretations, there is a presumption that Congress was aware of the earlier interpretations and, in effect, adopted them. *See Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

Specifically, in the absence of a voluntary undertaking to offer the transmission component of a service on common carrier terms, the decision to impose common carrier treatment depends on whether "the public interest ... require[s] the carrier to be legally compelled to serve the public indifferently" because the carrier "has sufficient market power." *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21,585, 21,588-89 (1998); *see Virgin Islands Tel.*, 198 F.3d at 924-25; *S.W. Bell Tel.*, 19 F.3d at 1481, 1484; *NARUC I*, 525 F.2d at 642; *Cable & Wireless*, 12 F.C.C.R. at 8521-22. Absent a unilateral decision to serve all customers indifferently, classification of a service as a "telecommunications service" – and imposition of attendant common carrier obligations – must be based upon a finding of market power. *See, e.g., AT&T Submarine Sys.*, 13 F.C.C.R. at 21,589; *see also Implementation of the Non-Accounting Safeguards of Sections*

271 & 272 of the Communications Act of 1934, as amended, 11 F.C.C.R. 21,905, 21,957 (1996) (subsequent history omitted) (declining to impose Title II regulation because the relevant market was "highly competitive"); *Procedures for Implementing the Detariffing of Customer Premises Equip. & Enhanced Servs.*, 95 F.C.C.2d 1276, 1301 (1983) (subsequent history omitted) ("[T]he advent and growth of competition in a particular market eliminates the need for continued regulation.").[9]

Both FCC and judicial precedent pre-dating the 1996 Act similarly make clear that the question whether the underlying transmission component of an integrated service offering must be stripped out and offered subject to the full panoply of obligations that apply under the FCC's *Computer Rules* depends upon the competitive state of the market. Those rules mandate that a carrier offer the transmission

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9. Indeed, the Commission has long refused to impose common carrier duties on "pure transmission" functions in competitive markets, even where the transmission service is offered on a "stand-alone" basis. *See, e.g., Licensing Under Title III of the Communications Act of 1934, as amended*, 8 F.C.C.R. 1387, 1388-91 (1993) (declining to impose common carrier duties on satellite services because carrier did not have "sufficient market power"); *Cox Cable Communications, Inc.*, 102 F.C.C.2d 110, 121-22 (1985), *vacated on other grounds*, 1 F.C.C.R. 561 (1986) (declining to impose common carrier duties on a carrier that "ha[d] little or no market power" and where "[t]here [we]re alternative methods of providing similar service"); *accord Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 207, 208 (D.C. Cir. 1982) (upholding Title I classification of enhanced services and customer premises equipment ("CPE") because "the market for enhanced services is 'truly competitive'" and "charges for CPE provided by carriers need no longer be regulated . . . because of the competitive market conditions now prevailing").

component – and, if requested to do so, offer individual elements of the transmission component – separately on common carrier terms. From the outset, the premise for the *Computer Rules* was that certain carriers possessed market power in the narrowband market, and the FCC declined to extend the rules to carriers where they "d[id] not have market power" and thus would not be in a position to act anticompetitively. *Computer II*, 77 F.C.C.2d at 468-69; *see, e.g., id.* at 428-30 (finding that it would not serve the public interest to subject enhanced service providers to traditional common carrier regulation because, among other things, the market was "truly competitive").

As the FCC put it in the *Declaratory Ruling*, requiring carriers to separate transmission facilities from the content they were designed to deliver is a form of "radical surgery," FCC Pet. 101a, which is justified only in the face of market failure and a substantial threat of anticompetitive behavior.[10] Congress was presumptively aware of the longstanding distinction between common carriage and private carriage and the traditional criteria applied to separate one from the other. Yet, not a word in the statutory definitions themselves, nor the purpose or legislative history of the 1996 Act, supports the proposition that the statutory definition of "telecommunications services" was meant to work a radical change in the law regarding common carrier status. Such a dramatic change in regulatory course (and repudiation of prior agency and judicial precedent) is hardly the stuff of *sub silentio* congressional action through adoption of a general definitional section in a statute.

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10. Ironically, in reviewing the FCC's *Computer Rules*, the Ninth Circuit itself recognized that common carrier regulation is unjustified in competitive markets. *See California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994); *California v. FCC*, 905 F.2d 1217, 1224 (1990), *vacated in part on other grounds*, 39 F.3d 919 (9th Cir. 1994).

The Ninth Circuit nonetheless made common carriage treatment the rule rather than the exception. It completely ignored the statutory predicate for imposition of government access and price regulation: the existence of some form of market power. By contrast, the Commission was on solid statutory ground in finding that the competitive nature of the broadband market eliminated any public interest justification for the application of common carrier duties to the transmission component of cable modem service. The broadband Internet access market is vibrantly competitive and is only growing more so with each passing day. *See, e.g.*, *USTA II*, 359 F.3d at 585; *USTA I*, 290 F.3d at 428. The Commission long ago confirmed that "no group of firms or technology will likely be able to dominate the provision of broadband services," *Rulemaking to Amend Parts 1, 2, 21, & 25*, 15 F.C.C.R. at 11,865, and that "the preconditions for monopoly appear absent" in the broadband market, *First Section 706 Report*, 14 F.C.C.R. at 2423-24. Accordingly, the Commission's decision not to separate out and impose common carrier treatment on the transmission component of cable modem service was amply supported by — indeed compelled by — the FCC's own precedent defining the broadband market's competitive characteristics.[11]

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11. The *Portland* and *Brand X* rulings ascribe an intent to Congress to make a fundamental change in the law in the direction of *increased regulation* in a statute based on the premise that natural monopoly is a thing of the past and that *deregulation* and increased competition would benefit consumers. When the Ninth Circuit's statutory error is stripped away, its only basis for imposing a different conclusion rests on policy preconceptions that have no place in judicial review of agency action. *See* FCC Pet. 34a (Thomas J., concurring).

3. The legislative history of the definitional provisions at issue here demonstrates Congress's intent to import the prior agency and judicial precedent regarding the limitations on common carrier treatment into the 1996 Act. *First*, the Conference Report to the 1996 Act specifically states that the definition of telecommunications services "recogniz[es] the distinction between common carrier offerings that are provided to the public . . . and private services." H.R. CONF. REP. No. 104-458, at 115 (1996). Relying upon the text and legislative history, both the FCC and the D.C. Circuit have concluded that the definition of "telecommunications services" did *not* work any radical change in the scope of common carrier status but, rather, "manifest[ed] Congress' intention to maintain the basic public-private dichotomy" that predated the 1996 Act. *Virgin Islands Tel.*, 198 F.3d at 927; *see Cable & Wireless*, 12 F.C.C.R. at 8521-22.

Second, with respect to the classification of the transmission component of "information services," the legislative history reveals that, at one point, Congress considered a formulation of "telecommunications services" that included "[t]he underlying transport and switching capabilities on which [information] services are based." S. REP. No. 104-23, at 18 (1995). What is more, the proposed definition of "telecommunications service[s]" expressly included "the transmission, without change in form or content, of *information services*." *Id.* at 79 (emphasis added). In the Act as adopted, however, the proposed reference to "transmission of information services" in the definition of "telecommunications services" was omitted. By holding that every information service must contain a "telecommunications service" component, the Ninth Circuit violated one of the most "compelling" principles of statutory construction; it effectively reinserted the language that Congress consciously removed from the definition of "telecommunications service" as enacted.

INS v. Cardozo-Fonseca, 480 U.S. 421, 442-43 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

4. Beyond its lack of support in the text, legislative history, or relevant precedent, the notion that through the definition of "telecommunications services" the 1996 Act created a wooden unbundling rule for the transmission component of an information service, regardless of market conditions, makes no sense as a matter of regulatory policy. Common carrier regulation is a *substitute* for competition, generally employed as a last resort where there are insuperable legal or economic barriers to market entry. *See* STEPHEN BREYER, REGULATION AND REFORM 37, 59 (1982). There is no need to imperfectly mimic competition through price or access regulation in markets where competition is present.

II. The Ninth Circuit's Reliance on the FCC's Outmoded Treatment of DSL Was Misplaced.

To the extent that parties argue that the FCC's own previous treatment of DSL supports the Ninth Circuit's conclusions, their claims are unavailing for two fundamental reasons.

1. As explained above, the FCC has never made an affirmative determination that market conditions warrant imposing mandatory common carriage obligations on DSL, but has merely applied those requirements reflexively based on the identity of the service provider. *See supra* p. 9. Instead, the FCC is now conducting proceedings to squarely address that issue for the first time. *See generally Wireline Broadband*

NPRM, 17 F.C.C.R. 3019; *ILEC Broadband NPRM*, 16 F.C.C.R. 22,745. Accordingly, the FCC's previous treatment of DSL was not based on any reasoned analysis of the standards established by its own precedent or the competitive conditions in the broadband market (or any analysis at all for that matter), and it cannot provide a basis for invalidating the FCC's conclusions in the *Declaratory Ruling*.

2. Given the competitive state of the broadband market, there is simply no justification for imposing mandatory common carrier obligations and the accompanying regulatory requirements on any broadband services, regardless of the identity of the provider. The Ninth Circuit's ruling, however, if left intact, would mean that all of these requirements would apply to cable modem service absent forbearance or the grant of a waiver by the FCC.

Those requirements impose a host of complex and costly mandates that deter investment, undermine competition, and cannot be justified in the competitive broadband market. As the FCC has repeatedly recognized, common carrier regulation causes affirmative harm in a competitive market. More than twenty years ago, the Commission stated that, where competition is present, services are best able to "burgeon and flourish" in an environment of "free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements." *Computer II*, 77 F.C.C.2d at 425-33; *see Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Servs. & Facilities*, 28 F.C.C.2d 291, 297-98 (1970).

For example, the tariffing and nondiscrimination requirements that apply under Title II of the Communications

Act, as well as the added requirements of the FCC's *Computer Rules*, generally require telecommunications carriers to offer "one-size-fits-all" products and services. This impedes the ability of broadband service providers to enter into mutually beneficial contractual arrangements with Internet content providers (such as the innovative compensation arrangements that prevail in other parts of the Internet). To the extent that they require mandatory access to risky new technologies and services at government-prescribed (cost-based) rates, these requirements also deter investment in innovative new technologies and services.[12]

The FCC has also correctly recognized that a tariffing regime, when imposed in a competitive market, "may facilitate, rather than deter, price coordination, because under a tariffing regime, all rate and service information is collected in one, central location," thereby rendering it easier for competitors to adjust prices in response to rate changes by each other. *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 11 F.C.C.R. 20,730, 20,740 (1996) (subsequent history omitted). Forcing *any* participant in a competitive market to disclose cost information, pricing information, and network architecture plans harms, rather than promotes, competition.

In addition, in the very order under review, the Commission correctly found that imposing a common carrier

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12. *See Petition for Forbearance of the Verizon telephone companies Pursuant to 47 U.S.C. § 160(c)*, FCC 04-254, 2004 FCC LEXIS 6098, at *24-*25, *31-*33 (Oct. 27, 2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,126-27, 17,145, 17,153 (2003) ("*Triennial Review Order*"), *vacated in part on other grounds sub nom., United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

regime on cable modem providers would conflict with Congress's command in Section 706 of the 1996 Act that the FCC remove barriers to entry and encourage broadband investment and deployment. FCC Pet. 104a; *see also id.* at 26 (common carrier obligations could lead carriers to "raise their prices and postpone or forego plans to deploy new broadband infrastructure"). The Commission and the courts have recognized that imposing "common carriage" duties and related regulatory requirements such as unbundling obligations deter capital investment by existing and potential competitors in the broadband market.[13]

In the competitive broadband market, imposing mandatory common carriage obligations on any provider would be unlawful. As an initial matter, this result would directly contravene the FCC and federal court precedent outlined above that prohibits imposing mandatory common carrier requirements in the absence of significant market power. *See supra* pp. 7-9, 23-25. This result would also violate Congress's clearly expressed command in Section 706 and elsewhere that the FCC take steps to promote broadband deployment and that the Internet continue to develop in an environment "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2); *see* S. CONF. REP. No. 104-230, at 1 (1996) (Joint Explanatory Statement); *S.W. Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

13. *See, e.g.*, *Wireline Broadband NPRM*, 17 F.C.C.R. at 3042-43 (noting that a minimal regulatory environment is necessary to "encourage market participants to deploy broadband networks more expeditiously and increase facilities-based competition"); *see also AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428-429 (1999) (Breyer, J., concurring in part and dissenting in part); *USTA II*, 359 F.3d at 584; *VOIP NPRM*, 19 F.C.C.R. at 4864; *Triennial Review Order*, 18 F.C.C.R. at 16,984, 17,149; *Access Charge Reform Order*, 12 F.C.C.R. 15,982, 16,094 (1997).

Moreover, any attempt to subject broadband providers to mandatory common carrier obligations would raise significant First Amendment concerns. Verizon's broadband platform is a medium through which it offers a form of speech – its own Internet and other content services – to its customers.[14] Broadband, in other words, is the microphone through which telephone companies (like their cable competitors) speak, and governmental restrictions that inhibit the reach or use of that microphone necessarily impinge on First Amendment interests.[15] This Court has traditionally found forced access requirements to be justified only in the presence of significant market power, *see, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196-204 (1997); *Turner I*, 512 U.S. at 661, but no such justification exists here, *see supra* pp. 2-3, 26.

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14. Federal courts have uniformly recognized that regulations affecting the ability of telephone companies to employ their facilities for expressive purposes are subject to heightened First Amendment scrutiny. *See, e.g., U.S. West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994), *vacated on other grounds*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996); *S. New Eng. Tel. Co. v. United States*, 886 F. Supp. 211 (D. Conn. 1995); *S.W. Bell Corp. v. United States*, No. 3:94-CV-0193-D, 1995 WL 44414 (N.D. Tex. Mar. 27, 1995); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994).

15. This Court has extended First Amendment protection to numerous "speech distribution" facilities or activities, including newsrack placement, *see City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 768 (1988), the public distribution of pamphlets, *see Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938), control over the participants in a parade, *see Hurley v. Irish-American Group*, 515 U.S. 557, 570 (1995), and a cable operator's control over the expressive capacity of its cable system, *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) ("*Turner I*").

The Ninth Circuit was accordingly wrong to place any reliance at all on the Commission's prior treatment of DSL. And, to the extent that the FCC's *Declaratory Ruling* contains any error at all, the Commission's error lies in its failure to address the regulatory disparity between cable modem service and DSL that its decision left in place.

III. A Remand Is Necessary for the FCC to Address Its Differential Treatment of Functionally Equivalent Broadband Transmission Services in Light of this Court's Decision.

If this Court determines, as Verizon believes it must, that the Ninth Circuit erred in its interpretation of the statutory definitions at issue in this case and upholds the FCC's classification of cable modem service as an "information service" subject to little or no regulation, the issues of regulatory parity and the proper classification of DSL raised in Verizon's petition for review will again rise to the fore. The NinthCircuit did not address those issues based on its erroneous conclusion that cable modem service includes a separate "telecommunications service" (imposing its own vision of "regulatory parity"). Because the Commission did not even address these issues in the *Declaratory Ruling*, this case should be remanded to the FCC to expeditiously rule on the proper statutory classification for DSL in light of this Court's opinion.

1. As noted above, and as Verizon demonstrated throughout the course of the proceedings below, the Commission itself recognized the link between cable modem service and DSL in the *Notice of Inquiry* that resulted in the order at issue here. *Notice of Inquiry*, 15 F.C.C.R. at 19,293; *see supra* p. 12. Issuance of the *Notice* was expressly

premised upon "[t]he convergence of technologies" that allows the provision of high-speed services over a variety of facilities, and the FCC expressly sought comment on "the impact of [its] approach [to cable broadband service] on other providers of high-speed services." *Notice of Inquiry*, 15 F.C.C.R. at 19,287; *see id.* at 19,287-91, 19,293, 19,296, 19,304-05.

2. Particularly given that it expressly invited comment on the consequences of its decision on the appropriate classification of cable modem services for other types of broadband services, the FCC was not at liberty to simply ignore the comments of Verizon and others demonstrating that continued disparate treatment of DSL services would be unlawful. Indeed, as Verizon demonstrated in its petition below, disparate treatment of DSL services not only would be utterly irrational – since it would impose unnecessary burdens on a secondary player in the broadband market and impede its ability to compete with the market leader – but also would violate the principles of competitive and technological neutrality embodied in the Communications Act. *See* 1996 Act, § 706(c)(1) (defining "advanced telecommunications capability" "without regard to any transmission media or technology"); 47 U.S.C. § 153(46) (defining "telecommunications service" "regardless of the facilities used"). And by imposing discriminatory regulatory obligations (including differential taxation) on similarly situated speakers, disparate treatment of cable modem service and DSL would flatly violate the First Amendment.[16]

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16. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993); *see also Turner I*, 512 U.S. at 641. Particularly problematic is the fact that DSL providers must pay 10.7 percent of their gross (Cont'd)

Under these circumstances, the Commission was under an obligation to eliminate the disparity between cable modem service and DSL or, at a minimum, provide a reasoned explanation for its failure to do so. Indeed, under well-settled principles of administrative law, the FCC was required to provide a reasoned factual and legal basis for its decision. This includes *some* response to significant comments that lay within the scope of the issue as defined by the agency itself. *See Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission was also obligated to respond to any constitutional objections and, in particular, First Amendment concerns connected with a particular regulatory path. *E.g.*, *Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 986 F.2d 537, 540 (D.C. Cir. 1993); *Meredith Corp. v. FCC*, 809 F.2d 863, 872-73 (D.C. Cir. 1987). Likewise, the FCC was required to provide a reasoned explanation of conflicting prior precedents or revise those past decisions to achieve consistency. *See State Farm*, 436 U.S. at 42-43; *Nat'l Fed'n of Fed. Employees v. Fed. Labor Relations Auth.*, 369 F.3d 548, 553 (D.C. Cir. 2004).

What the Commission could not do is to address only half of the regulatory problem framed by its own *Notice of*

(Cont'd)

revenues to support universal service, while cable modem service providers are not subject to any such obligation. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3054; 47 U.S.C. § 254; *Proposed First Quarter 2005 Universal Serv. Contribution Factor*, DA 04-3902, 2004 FCC LEXIS 6989 (Dec. 13, 2004). This suppresses the expressive output of one provider in the same manner as disparate taxation of competing media outlets and is contrary to the First Amendment. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r*, 460 U.S. 575, 585 (1983).

Inquiry. *State Farm*, 463 U.S. at 43.[17] The Commission nonetheless ignored all of this and arrived at a statutory classification of cable-based Internet access without regard to the proper treatment of competing services.

3. If this Court reverses the Ninth Circuit's *per curiam* opinion (as we believe it should), the issues raised in Verizon's properly preserved petition for review still must be addressed. Given the unique posture of this case, it is appropriate to allow the agency charged with enforcement of the Communications Act to make the initial determination regarding the application of this Court's decision in this case to DSL and other broadband technologies. If the Commission is authorized or compelled to treat cable modem service as an "information service" under the Communications Act, the FCC must apply the principles in the *Declaratory Ruling* and this Court's decision in determining the appropriate treatment of DSL. The FCC, however, wholly failed to address this issue or articulate any basis for its decision below. Under circumstances such as these, "a remand to the Commission is the proper course in order that the Commission in the first instance may clearly enunciate" the grounds for its decision. *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 520 (1979); *see Gulf Power*, 534 U.S. at 347 (Thomas, J., concurring in part and dissenting in part) ("I would vacate the Court of Appeals' judgment and remand the cases to the FCC with instructions that the Commission clearly explain the specific statutory basis" for its decision.).

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17. *See Gulf Power*, 534 U.S. at 347 (Thomas, J., concurring in part and dissenting in part) (stating that the case should have been remanded because "the FCC failed to engage in reasoned decisionmaking" by declining to decide how cable broadband Internet access should be classified under the Act before asserting jurisdiction over pole attachments that provide commingled cable television service and broadband Internet access).

This is consistent with the practice of appellate courts, which often remand petitions for review to the agency on their own motion in light of intervening precedent from this Court. *See, e.g., Prill v. NLRB*, 755 F.2d 941, 950-54 (D.C. Cir. 1985); *Times Publ'g Co. v. NLRB*, 576 F.2d 1107, 1109-10 (5th Cir. 1978). Accordingly, this Court should remand the case to the FCC with instructions to address the issues raised by Verizon's petition for review in light of this Court's ruling.

CONCLUSION

For the forgoing reasons, the Ninth Circuit's *per curiam* decision should be vacated and remanded to that court with instructions to remand the case directly to the FCC to expeditiously address the issues raised in Verizon's petition for review.

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